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## THE OBLIGATION OF THE LEGISLATURE AS WELL AS OF THE JUDICIARY TO RESPECT CONSTITUTIONAL LIMITATIONS.

[Paper read by RICHARD C. DALE, ESQ., before the Pennsylvania State Bar Association at its Annual Meeting, June 27, 1900.]

In September, 1887, the Centennial of the Federal Constitution was celebrated in Philadelphia. In February, 1890, the Centennial of the Supreme Court of the United States was celebrated in the city of New York. On each occasion the Federal and State Judiciary joined with statesmen and distinguished leaders of the bar in giving testimony to the successful working of a Constitutional System, by which firm barriers have been raised against the tyranny of political assemblies. Its checks and delays aptly have been said by James Russell Lowell to be "but obstacles in the way of the people's whim and not of their will."

But our ears are dull of hearing if we have failed to catch an undertone of murmuring and questioning. Particularly during the last decade alarm has been justly excited in the hearts of those, to whom the Constitution is the great palladium of our liberties.

The spirit of criticism has attacked not only the Federal Constitution, but also the System as embodied in the State Constitutions. Doubts have been raised as to the wisdom of any written Constitution. The exercise by the judiciary of the power of declaring statutes void, because in derogation of constitutional provisions has been most vigorously assailed as an unwarranted interference with the right of the people to express their will through chosen representatives in Congress or Legislature assembled. In some quarters this sentiment has taken very definite shape, and ominous threats are made, extending even to the obliteration of the court by whose judgment, it is said, the will of the sovereign people is thwarted.

Political writers of reputation have given to this movement the aid, which character and scholarship carries; and we who believe that the way established by the Fathers of the Republic is the better way, are called upon to defend propositions which for nearly a century have passed current and with little challenge.

Convinced that the prevalent scepticism of the advantages of our Constitutional System is due in great measure to a forgetfulness of the fundamental principles upon which all free government rests, it is proper to recall the essential distinction in theory between our government and those of the countries from which our forefathers emigrated. This distinction is sharply brought to mind when the words "citizen" and "subject" are contrasted. In lands where the inhabitants are "subjects," the government is an entity existing apart and distinct from the people. There is a "sovereign power" which exists in contradistinction to the people governed. This sovereign power may be exercised by an emperor, a czar, a king or a parliament; in either case, an individual or a limited number of individuals is assumed to possess sovereignty over the mass who are governed.

Tradition, custom, fear of rebellion, may restrain the sovereign in the exercise of power, but the individual men who constitute the nation are subjects of that sovereign.

The land from which we derive our language—the great body of our laws and the fundamental principles of

our liberties was governed by a sovereign. Parliament, composed of King, Lords and Commons, was a sovereign governing power—restrained, it is true, by tradition, custom, and knowledge that the governed knew how to rebel, and dared to fight, if need be, to protect their rights as freemen—but still an absolute power. From time to time protests were heard against this absolutism.

A few English judges have intimated that an act of Parliament against Common Right was void; but the accepted opinion has been, that Parliament absorbs to itself all the Supreme Powers of Government;—legislative, executive and judicial. There is no appeal within the law against an edict of Parliament. To reverse it, there must be rebellion, only to be justified upon general provocation and ability to carry to a successful end.

In his address at New York on the fiftieth anniversary of the Federal Constitution, John Quincy Adams said this doctrine of absolutism of Parliament was the moving cause of our war of Independence:

“The English lawyers had decided that Parliament was omnipotent—and Parliament in its omnipotence instead of trial by jury and the *habeas corpus*, enacted Admiralty Courts in England to try Americans for offences charged against them as committed in America. . . .

English liberties had failed them. From the omnipotence of Parliament the colonists appealed to the rights of men and the omnipotence of the God of battles.”

This spirit of the war of Independence was never more forcibly expressed than in the words which Charles James Fox placed in the mouth of the rebellious subjects of James II.:

No, you have no property in dominion; dominion was vested in you, as it is in every Chief Magistrate, for the benefit of the community to be governed—it was a sacred trust delegated by compact;—you have abused that trust—you have exercised dominion for the purposes of vexation and tyranny—not of comfort, protection and good order; and we therefore resume the power which was originally ours. We recur to the first principles of all government—the will of the many—and it is our will that you shall no longer abuse your dominion.

Independence having been established by our fathers, the government under which we live, repudiated not only the

nomenclature but also the essential theory of government as understood and enforced in the Old World. There is no omnipotent person or body whose edicts control the people. The divine right of the sovereign gave place to the divine right to be free. The governed and the governors are one. The body of freemen are the source of all power. Every freeman is a citizen, and happily every man is now a free-man.

There is no sovereign power which can limit, control, or abridge the exercise by each freeman of the fundamental rights of life, liberty and pursuit of happiness, which include the acquisition, possession and enjoyment of property.

But while "the people" are recognized as the source of all governmental power, we must be mindful not to be misled by the flattering metaphors of orators as to the powers of the "sovereign people." In a limited sense, which we will seek hereafter more carefully to define, the people are sovereign; but the phrase, as commonly used, has led to many erroneous conclusions and deductions. It is certainly illusive when it induces each of an audience to whom it is addressed to regard himself as a "sovereign," possessing the prerogative, either individually or in association with other like "sovereigns," to exercise arbitrary or absolute power over the property or rights of his fellow-citizens; and the phrase "sovereign people" is equally objectionable when it is used to give support to the idea that a majority of the voters of a state possess, in an absolute sense, power to control or direct the conduct, or abridge the natural rights of freemen. The unlimited despotism of a majority is the most dangerous form of tyranny.

In 1802, a distinguished senator noticed this insidious flattery of the "sovereign people" in these words:

I hope, however, that the government and the people are now the same, and I pray to God that what has been frequently remarked may not, in this case, be discovered to be true; that they who have the name of the people most often in their mouths, have their true interest most seldom at their hearts.

The majority of voters are not a "sovereign power," and the nation at large does not bear to that majority the relation which subjects bear to a sovereign.

While there is a sense in which we may regard the people as sovereign, there is, also, high authority for a dignified reserve in using the phrase.

Justice JAMES WILSON, in *Chisholm v. Georgia*, 2 Dallas, 257, said :

To the Constitution of the United States, the term *sovereign* is totally unknown. There is but one place where it could have been used with propriety. But, even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They *might* have announced themselves "sovereign people of the United States;" but, serenely conscious of the fact, they avoided the ostentatious declaration.

The only sense in which the use of the word "sovereign" is permissible, even when annexed to people, is to emphasize the thought that a nation of freemen recognize no sovereign power other than the Constitution, and laws made pursuant thereto, which, by common consent, have been established and enacted, to the end that each freeman may more perfectly enjoy his liberty and attain, in the largest measure, the exercise of his natural rights. As was well said by Caleb Cushing, in the House of Representatives :

We did not constitute this government as the means of acquiring new rights, but for the protection of old ones which nature had conferred upon us, which the Constitution rightly regards as pre-existing rights, and as to which all the Constitution does is to provide that these rights—neither you—nor any power on earth shall alter, abrogate or abridge.

Free government exists not to control the actions of its citizens as subjects—but to enable each man to enjoy his own without let or hindrance, and to protect from the encroachments of the lawless, those who are willing to live with due recognition of the natural rights of others. In this sense only the people are sovereign, that in them as an entirety, is the source of the power conferred by common consent upon certain governmental agencies to be exercised in accordance with the terms of the grant for the common good.

The act of the people in framing a scheme of government properly may be spoken of as the act of a "sovereign power." It was consummated in the adoption of the Federal Constitution. As John Quincy Adams said, "The constituent sovereignty of the people was the basis of the Constitution."

The congress upon which legislative power was conferred did not thereby acquire "sovereign powers." There was only a delegation of the power of enacting laws—of exercising the legislative power upon the subjects which are within the scope of national government as distinguished from state government; matters concerning the people of the United States and not the people of the several states. This assertion is not made to support any doctrine of "strict construction." That is a mere question of detail. For the purposes of this discussion we concede the broadest construction which any rational mind can give to the final sentence in Article I § 8 of the Federal Constitution.

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.

The proposition which we maintain is that all legislative powers exercised by Congress or state legislatures are delegated powers, and hence must be exercised in accordance with the terms of the instrument conferring the powers.

The source of power is the people, who in this sense are sovereign—the government is of the people—but having established, through the Constitution, a government of limited powers, and delegated to proper governmental agencies the exercise of those powers—and having further provided for the continued existence of those agencies through successive elections and appointments, the sovereign power rests.

The elections which from year to year are conducted in accordance with constitutional requirements are not the exercise of sovereign power. The body of the people bound themselves in the Constitution to accept as servants for the performance of official duty those whom a majority of lawful voters might name for the service. Not only are those elected, agents of the people, exercising delegated powers, but the majority of the electors, who name those thus elected, are themselves exercising a power delegated in the Constitution by the entire body to the electors. In legal effect the Constitution is a continuing compact;—in some respects

very analogous to a partnership agreement. For certain purposes the entire body agree that the act of the majority shall bind all. In so acting the majority are the agents of the entire body, and their act is efficient not as an exercise of sovereign power, but because by the frame of government all have agreed that elections shall be so held.

This doctrine of the delegation of power is as applicable to the state as it is to the federal legislative body.

#### PENNA. CONSTITUTION of 1776. Chapter I.

§ IV. That all power being originally inherent in and consequently derived from the people, therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

§ V. . . . And that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government, in such manner as shall be by that community judged most conducive to the public weal.

#### CONSTITUTION of 1790. Preamble.

We, the people of the Commonwealth of Pennsylvania, ordain and establish this Constitution for its government.

#### ARTICLE I. § I.

The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.

#### ARTICLE IX. § II.

That all power is inherent in the people, and all free governments are founded on the authority, and instituted for their peace, safety and happiness. For the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform or abolish their government, in such manner as they may think proper.

§ XXVI. To guard against transgressions of the high powers which we have delegated *we declare* that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.

The same propositions are found in the Preamble of the Constitution of 1873 and in the Declaration of Rights, Article I, § I and § XXVII.



A precedent for limitations upon legislative power is found in the Royal Charter for the Province of Pennsylvania granted to William Penn, where the legislative power of the Provincial Assembly is thus qualified; after the clause in which the law-making power is conferred is the following proviso:

Provided, nevertheless, that the said laws be consonant to reason, and be not repugnant or contrary, but (as near as conveniently may be) agreeable to the laws, statutes and rights of England.

Similar limitations are found in other colonial charters.

These preliminary suggestions are made not for the purpose of particularly defining the extent of the powers of Congress or state legislature, but to emphasize two cardinal principles.

*First.*—The body upon whom legislative power is conferred is not a sovereign or omnipotent body. It is an assembly of agents or trustees to whom the body of the people have delegated the duty of legislation. The people remain the ultimate source of power, in them alone is vested the constituent sovereignty. The extent of the power thus delegated is to legislate, one of the independent functions of government, but not the attribute of sovereignty or absolute government.

*Second.*—The power of legislation has not been conferred without limitations. In the case of the National Congress no general power to legislate has been conferred, and by the terms of the instrument defining the extent of the powers, none pass except those expressly mentioned, and such as are properly incidental to render effectual those expressly conferred.

In the case of state legislatures, the powers of legislation conferred are to legislate generally. But from the earliest Constitution, as is shown by the preceding quotations, the Bill of Rights operated as a limitation upon the otherwise general legislative power. We fully recognize the distinction between the construction of the federal and state constitutions. One body is of limited and the other of general legislative powers; but the general powers of the state legislature are subject to many expressed restrictions,

and perhaps more important than all, it is always to be remembered that the powers of Congress and the powers of state legislatures are legislative only. Legislation must be distinguished from a general exercise of sovereign power. A body to whom only the duty of legislation has been delegated does not thereby acquire sovereign power. It is not legislation to decree that the property of A shall become the property of B. Such an enactment is void, not because of any constitutional prohibition or limitation, but because it is not legislation. Examples could be multiplied, a single illustration is sufficient. A sovereign parliament might possess absolute and arbitrary power. A legislature convened to legislate does not. When any legislative body transcends the limit of legislation, Lord Chatham's words in questioning the arbitrary exercise of power by the House of Commons well apply :

Tyranny is detestable in every shape, but in none so formidable as when it is assumed and exercised by a number of tyrants.

In *Sharpless v. Philadelphia*, 21 Pa., St. 147, Black, Woodward and Knox pointed out this limitation upon legislative action with great clearness.

BLACK, C. J., p. 167.

Perhaps there is nothing in the books which shows the tenacity with which the court has adhered to the letter of the Constitution in determining the extent of legislative power, more plainly than the doubt which was once entertained (10 Watts, 63) whether the want of an express inhibition did not permit the Assembly to take one man's property and give it to another. The Constitution *does* prohibit it. It is not within the general grant of legislative power. It would be gross usurpation of judicial authority, and would violate the very words of Section XI, Art. IX. The legislature could not make such a rescript (for it would not be law), any more than they could order an innocent man to be put to death without trial.

P. 168.

I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden cannot be thrown upon a single individual, under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the tax of the whole state. These things

are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An act of Assembly, commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence or order or decree. . . .

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money, from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.

In this case, the court held that public money raised by taxation might be applied to aid the building of a railroad, because the use was public; but in *Loan Association v. Topeka*, 20 Wallace, 655, it was pointed out that public moneys could not be applied to the aid of a manufacturing enterprise—MILLER, J., saying:

Where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power.

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KNOX, J., p. 185. The right of this court to declare an act of the legislature unconstitutional, is unquestionable, and I may safely add, unquestioned.

In ascertaining whether there has been this clear usurpation by the law-making power, I agree with the Chief Justice, and Mr. Justice WOODWARD, that the tests to be applied are: *First*—Is the act in the nature of a legislative power? *Second*—Does the Constitution expressly, or by necessary implication, forbid the exercise of such power?

The two questions are closely assimilated. If it is not in the nature of a legislative power, the Constitution does, by necessary implication, forbid the General Assembly from exercising it. All attempts upon the part of the legislature to exercise the class of powers committed to the care of the judiciary, are clearly unauthorized and unconstitutional. For there is a necessary implication arising from the organization and recognition of the judicial branch of the government, that its authority shall be supreme, and its jurisdiction exclusive upon subjects committed to its care and upon questions to be determined by its judg-

It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognizes no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic of power, is after all but a despotism. It is true that it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

A clear apprehension of the rule, that the enactment by a legislative assembly must be legislative in its nature, in order that it may be of force, renders it unnecessary to discuss the question, whether legislation not expressly prohibited, but in violation of what is styled common right, is void. Cases are often suggested which shock the sense of natural right and yet which do not come within any express prohibition of the Bill of Rights or of the Constitution. The

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ment. Hence the legislature cannot lawfully grant a new trial in a case once determined. This court might with equal right declare, that a bill which has passed through all the forms of legislation should again be submitted to a vote of the Senate and House of Representatives, and presented to the Executive for his approval or rejection, as for the legislature to say that a verdict of the jury, and a judgment of a court should be set aside, in order to give the parties litigant another opportunity to ascertain where right and justice belong.

It is unnecessary to multiply instances or words to prove that the legislature cannot rightfully exercise judicial or executive authority. It is confined to its own sphere of action, separate and distinct from the other departments of the government.

WOODWARD, J., p. 158. When the legislature disregards the distribution made of the powers of government, among the three co-ordinate departments, or the restrictive clauses in the body of the instrument, or the reservations of the Bill of Rights, or the grants of the Government of the United States—the judiciary, whose office it is to expound the law, may, and I hold are bound to declare the act unconstitutional and void.

true solution of most of these cases is that the attempted act of the legislature is not legislation. It may be an encroachment on the prerogative of the executive. It may be an attempt to exercise judicial powers. It may be an act beyond the power of free government. If it come not within the definition of legislation, it is of no force. If, however, the act be legislative in its character and not prohibited by some express provision of the Constitution, then the legislature alone is responsible for the exercise of its discretion—then the discretion having been exercised, no other department of government can review the question and refuse obedience to the law enacted by the body to which under our form of government the law-making power has been delegated.

From the foregoing it would appear that legislative enactments are of no force:

1. When prohibited by the express language of the Constitution.

2. When under the guise of legislation, statutes not legislative in their character are promulgated.

Such edicts or rescripts are not within the chart of legislative authority and do not carry with them the duty of obedience. But how is this question of duty to be determined. How, when the interest of one calls for the enforcement of such enactment and the interest of another denies its validity, is the issue to be settled.

In his famous dissenting opinion in *Eakin v. Raub*, 12 S. & R., 330, in denying the power of the judiciary to declare a statute of no force, because unconstitutional, Judge GIBSON was driven to the conclusion that in cases really affecting the vital interest of the citizen, his only recourse was to determine the issue for himself and to take the personal responsibility of resisting, even to the death the enforcement of a statute which was not law.

The right is peremptorily asserted and examples of monstrous violations of the Constitution are put in a strong light by way of example; such as taking away the trial by jury, the elective franchise, or subverting religious liberty. But any of these would be such a usurpation of the political rights of the citizens, as would work a change in the very structure of the government; or, to speak more prop-

erly, it would itself be a revolution, which, to counteract, would justify even insurrection; consequently, a judge might lawfully employ every instrument of official resistance within his reach. By this I mean, that while the citizen should resist with pike and gun, the judge might co-operate with *habeas corpus* and *mandamus*. It would be his duty, as a citizen, to throw himself into the breach, and, if it should be necessary, perish there.

The opposite view is most tersely put in an early Georgia case. I refer to the opinion of Judge CHARLTON in *Greenfield v. Ross*, Charlton's Report, 176.

From passion, from unprincipled ambition, from the illusions of ignorance, from the ebullition of political acrimony or misguided zeal, it is very easy to perceive the possibility of an unconstitutional act of the legislature. What, then, is the remedy? A recourse to the people's vengeance? Must the people be called upon to defend, in their aggregate capacity, that compact and those privileges which flowed directly from the source of their volition? If this is the remedy, our boasted republicanism is nothing more than systematic anarchy; and it would be therefore better for us to repose in the thorny protection of an absolute monarchy. Is the remedy found in the patient endurance of the evil until succeeding legislatures think proper to repeal the unconstitutional enactment? This would be worse than popular insurrection, because it presupposes an outrage upon the constitutional rights longer than ought to be borne by American citizens. The remedy can only be found, then, in the wisdom and independence of the judicial department. Here the passions, the feelings and the interests which may and do sway deliberative bodies cannot be found. This department is aided by all the lights which cautious and dispassionate consideration can afford; and it is governed by maxims of jurisprudence which *apertis foribus* offer a secure asylum to every citizen whose weakness or injuries solicit admission and protection. This department cannot deviate from those fixed principles which for ages the approbation of mankind has stamped with the seals of truth and authority. In this respect the judicial is unlike the legislative department, whose functions are regulated by the caprice of an arbitrary discretion. Under this view of the judicial department it is surely the best, the safest, and in our republic can be the only mediation between a citizen and an unconstitutional act of the legislature.

The heresy, contained in his dissenting opinion, our great Chief Justice subsequently recanted in *Menges v. Wertman*, 1 Pa. St. 218, saying:

In the other states the courts have often pronounced acts of legislation to be unconstitutional, with the acquiescence of the legislature and

the people. But by giving too much scope to the principles that this authority is to be exercised only in extreme cases, we have bound our hands so far as to have nearly relinquished the authority itself. It would ill become me to impute blame for it to the distinguished men who have preceded me, or to those with whom I am or have been associated; for it is known that I went beyond them in restricting the constitutional power of the court. My theory, however, seems to have been tacitly disavowed by the late convention, which took no action on the subject, though the power has notoriously been claimed and exerted. But experience has taught me the futility of mere theory. There must be some independent organ to arrest unconstitutional power. It would be useless for the people to impose restrictions on legislation if the acts of the agents were not subject to revision.

The same sentiment was expressed from the Bench in the report of the argument in *Norris v. Clymer*, 2 Pa. St. 277.

It is a striking coincidence that when Judge GIBSON was driven from his original position by the argument of the necessity of the case, he followed the line of reasoning adopted by Mr. Calhoun in one of his great arguments in the Senate:

But it will be asked how the court obtained the power to pronounce a law unconstitutional when it comes in conflict with that instrument. I do not deny that it possesses the right, but I can by no means concede that it was derived from the Constitution. It had its origin in the necessity of the case. Where there are two or more rules established, one from a higher, the other from a lower authority, which may come into conflict in applying them to a particular case the judge cannot avoid pronouncing in favor of the superior against the inferior. It is from this necessity, and this alone, that the power was derived. It had no other origin. That I have traced it to its true source will be manifest from the fact that it is a power which so far from being conferred exclusively in the Supreme Court as is insisted, belongs to every court, inferior and superior—state and federal.

This quotation is most instructive because it emphasizes the important principle that courts in passing upon the constitutionality of statutes exercise a purely judicial function. Their judgment is entered in the particular case upon a definite issue raised whether a certain legislative enactment is law, and the court must decide that issue in order to give judgment between the parties.

Strictly speaking, the judgment binds no one except the

parties. The statute is not repealed or annulled by the judgment of the court. It still has its place in the statute book, but the court judicially determines that while the statute has the form of law, it does not affect the rights of the litigants who invoke the higher law of the Constitution. But although the court does not override the legislature, the moral force of its decision may be prevailing—it gives promise that if the same issue is raised between other litigants the same judgment will be entered. The judicial branch of the government comes into no conflict with the legislature—each continues to move in its appointed course. This is the true view of the judicial function. While it may not place the judiciary in apparent elevation as a Court of Appeal above the legislature—the constant recognition of the limited effect of the judicial judgment will tend to conserve the true influence of the courts. The substance not the form of power should be desired. The less the appearance, the longer will it continue.

In the earlier history of the states, the courts were rarely called upon to declare acts of the legislature unconstitutional. In our Commonwealth for the half century following the Constitution of 1790 there is not a single instance where a statute was determined to be unconstitutional—but there was a uniform consensus of judicial opinion (with the exception of the dissenting opinion of C. J. GIBSON already quoted) that the judiciary must have the power of declaring a statute to be of no force, if enacted in disregard of the higher law of the Constitution.

In the minutes of the Council of Censors in 1784, the committee appointed to point out the defects in the Constitution of 1776, *inter alia* reported :

Your committee conceives the said Constitution to be in this respect materially defective, referring to the power of the legislature to remove the judges :

Because if the assembly should pass an unconstitutional law, and the judges have virtue enough to refuse to obey it, the same assembly could instantly remove them.

This indicates that the men who took part in forming our government had a very definite opinion that an unconstitutional law was no law—and that the test of virtue in a



judge would be his refusal to obey it—by which we understand that in the performance of his judicial duty he should give it no effect in rendering judgments.

I shall not attempt to refer to the numerous cases in which the courts of the several states committed themselves to the right of the judiciary to declare an unconstitutional law to be of no force. There is a full collection in Mr. Meigs' article "On the Relation of the Judiciary to the Constitution," *American Law Review*, March-April, 1885, p. 175, etc., and Professor Thayer's article—"The Origin and Scope of the American Doctrine of Constitutional Law," *VII Harvard Law Review*, 129.

I refer only to the striking charge of Judge PATERSON in the U. S. Circuit Court for this district, in 1795,—*Van Horne's Lessee v. Dorrance*, 2 Dallas, 304, when he said :

What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; they derive their powers from the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes limits to the exercise of legislature or legislative authority, and prescribes the orbit within which it must move. In short, gentlemen, the Constitution is the sun of the political system, around which all legislative, executive and judicial bodies must revolve. Whatever may be the case of other countries, yet in this there can be no doubt—that every act of the legislature, repugnant to the Constitution, is absolutely void.

And the opinion of C. J. TILGHMAN, in *Eakin v. Raub*, 12 S. & R., 330 :

It will be sufficient to say, that I adhere to the opinion which I have frequently expressed, that when a judge is convinced, beyond doubt, that an act has been passed in violation of the Constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and to the people, the only source of legitimate power, who, when they formed the Constitution of the state, expressly declared that certain things

*"Were excepted out of the general powers of government, and should forever remain inviolate."*

The people declared also on their adoption of the Constitution of the United States :

"That it should be the supreme law of the land, and that the judges in every state should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Upon this subject I have never entertained but one opinion, which has been strengthened by reflection, and fortified by the concurring sentiments of the Supreme Court of the United States, as well as of lawyers, judges and statesmen of the highest standing in all parts of the United States of America. Nevertheless, the utmost deference is due to the opinion of the legislature,—so great, indeed, that a judge would be unpardonable, who in a doubtful case should declare a law to be void.

### And Judge DUNCAN in the same case :

Maintaining, as I do, the power and the duty of the court to decide upon the constitutionality of all acts of the legislature, yet it is one which all courts will approach with caution and circumspection, and with every proper respect for a co-ordinate branch of the government, and with great reluctance will they pronounce an act of the legislature unconstitutional, and only where it comes in undoubted collision with the Constitution of the United States, or with that of this state. But it is a duty, however irksome, which they are bound to perform, without regard to personal considerations ; for no principle can be better established—none more conducive to personal liberty and security of property,—none of which the people of this free country can more justly boast,—none which so pre-eminently distinguishes our American Constitution over every other country and government, than the doctrine which has prevailed since the formation in the courts of all these states, from Maine to Georgia, that the people possess the sovereign right to limit their lawgiver, and that acts contrary to the Constitution are not binding as laws. The concurrence of statesmen, of legislators and of jurists, uniting in the same construction of the Constitution, may insure confidence in that construction.

Even C. J. GIBSON, in the dissenting opinion before cited, recognized that the limitations of the Federal Constitution must be enforced by the courts, distinguishing that from the State Constitution because of the provision.

In *Marbury v. Madison*, 1 Cranch, 137, MARSHALL, C. J., settled the law for all time in the federal courts :

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States ; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to

their own happiness is the basis on which the whole American fabric has been created. The exercise of this original right is very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.

. . . . .

The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people, to limit a power in its own nature illimitable.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that the courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory, it would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict

their powers within narrow limits, it is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient in America, where written constitutions have been viewed, with so much reverence, for rejecting the construction. . . .

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

And there is no better statement of the rule than in the opinion of the several judges of our Supreme Court in *Sharpless v. Philadelphia*, 21 Pa. St. 147.

BLACK, C. J., p. 160. The powers bestowed on the state government were distributed by the Constitution to the three great departments: the legislative, the executive, and the judicial. The power to make laws was granted in Section I of Art. I, by the following words: "The legislative power of this Commonwealth shall vest in a general assembly, which shall consist of a Senate and House of Representatives." It is plain that the force of these general words, if there had been nothing else to qualify them, would have given to the Assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British Parliament. But the absolute power of the people themselves has been previously limited by the Federal Constitution, and they could not bestow on the legislature authority which had already been given to Congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the Assembly was still further confined by that part of the Constitution called the "Declaration of Rights," which, in twenty-five sections, carefully enumerated the reserved rights of the people, and closes by declaring that "everything in this article is excepted out of the general powers of the government, and shall remain forever inviolate." The General

Assembly cannot, therefore, pass any law to conflict with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the Constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

WOODWARD, J., p. 179. The striking peculiarity in the civil and political condition of the people of this country, is that they live under the jurisdiction of two separate and distinct governments both formed by themselves, and the powers of each limited by written constitutions. The people of Pennsylvania, made absolutely free, sovereign, and independent, on the fourth day of July, 1776, settled for themselves a frame of government which, as modified in the present Constitution, organizes the various departments of a republican government, legislative, executive, and judicial; and vests in them, not specific and enumerated powers, but legislative power, executive power, and judicial power. Whatever is in the nature of these three governmental powers (and for their nature we must refer ourselves to the principles of political science) belongs to these departments respectively, but not without limitations. The Bill of Rights is a series of reservations out of the powers granted to these departments, and concludes with a solemn declaration in these words: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate." The primary questions, therefore, that arises upon the constitutionality of an act of assembly, are first: Is it in the nature of legislative power; and secondly, does it trench upon any of the reservations in the Bill of Rights? If the first of these questions can be answered affirmatively, and the other negatively, the resulting conclusion is that the act is constitutional. So far in regard to the State Constitution. . . .

P. 183. I have no doubt of the right and duty of the judiciary to declare a law unconstitutional, when it clearly contravenes any of the provisions of the State or Federal Constitution; but it is a power to be exercised with great caution. For nearly fifty years of our political existence, under the Constitution of 1790, no act of Assembly was set aside for unconstitutionality. Judges claimed the power, and said they would exercise it in clear cases, but in all that period no case arose which, in their judgment, was clear enough to justify the exercise of the power; and it is well known that that great light of this bench, so recently extinguished, stood opposed, for many years, to the existence of any such judicial power. Since the Constitution of 1838 was adopted, several acts of assembly have been declared unconstitutional, but they were all clear cases.

Although there is a line of cases in various states, and in some of the federal courts, in which acts of the legis-

lature have been declared unconstitutional as violative of common right without reference to any particular clause of the Constitution; careful examination will show that the real ground of objection to the statute declared void was that it was not legislative in its tenor, and the judgment of the court would have been better supported had this reason been given; reference is made to several of these cases in the opinion of BLACK, C. J., already quoted (21 Pa. St., 162).

The citations which have been made show, that the men whom we are taught to reverence as the sages of American constitutional law did not doubt the power of courts, in settling the rights of litigants, to treat as null legislative acts promulgated in disregard to the limitations, which the people have placed upon the powers of those to whom our earliest Constitution in defining the relations of officials to the people, fittingly referred as

All officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

When due recognition is given to these principles, the community will truly recognize that

Mankind made a long step—a great stride when he declared that minorities should not rule—a still higher and nobler advance had been made when it was decided that majorities could only rule through regular and legal forms.

The true theory of Constitutional Government as against the unlimited power of the legislature or of a law-making majority, has never been more clearly stated than in the words of the great statesman to whom I have already referred.

I know that it is not only the opinion of a large majority of our country, but it may be said to be the opinion of the age, that the very beau ideal of a perfect government is the government of a majority acting through a representative body, without check or limitation on its power . . . but

The necessary tendency of all governments based upon the will of an absolute majority without constitutional check or limitation of power, is to breed corruption, anarchy and despotism; and this whether the

will of the majority be expressed directly through an assembly of the people themselves or by their representatives.

The government of the absolute majority instead of being the government of the people is but the government of the strongest interests, and when not efficiently checked is the most tyrannical and oppressive that can be devised.

To maintain the ascendancy of the Constitution over the law-making majority is the great and essential point on which the success of the system must depend. Unless that ascendancy can be preserved, the most necessary consequence must be that the laws will supersede the Constitution.

That I may not seem to place too much stress on the views of a statesman, some of whose opinions have not stood the stress of time, I would add to the words of Mr. Calhoun, a brief quotation from one who, on the distinctive issues of their day, was altogether opposed to him :

This annihilation of the individual by merging him on the state lies at the foundation of despotism. The nation is too often the grave of the man. This is the more monstrous because the very end of the state, of the organization of the nation, is to secure the individual in all his rights, and especially to secure the rights of the weak. Here is the fundamental idea of political association. In an unorganized society with no legislature, no tribunal, no empire, rights have no security. Force predominates over rights.

W. E. CHANNING.

After the judiciary has done its part there still remains a wide field for legislative action in making effectual the constitutional guarantees of successful free government.

We have heard much of the indifference of legislators to constitutional limitations. By some this indifference is attributed to a prevailing sentiment that such questions are for the courts. This is a radical error. We have already seen that by some high authorities the duty of the judiciary has been founded on the obligation of their oaths to support the Constitution. The same oath has been taken by every legislator, and no man is worthy to sit in any American legislative body upon whose conscience that oath does not rest with binding force, and upon whose official conduct the principles of the Constitution are not ever present as the controlling governor. We must not hide from ourselves the

knowledge that the intense interest which our people have taken in the material development of the state and the absorbing devotion to bettering their physical condition has distracted the minds of the community too much from attention to the principles of free government. It is in no spirit of criticism I refer to this. We all know that in our own professional lives, our attention is largely absorbed in controversies and consultations in which the public aspect of the laws have but little part. Recognizing this truth, the time spent in this meeting will not have been wasted if our minds are recalled to a serious contemplation of the fundamental principles of free government, the perpetuation of which is the only pledge for a continuation of the conditions under which our material interests will prosper in the future as they have in the past. The Legislature of Pennsylvania has always been largely composed of lawyers. If the lawyers of that body would carry with them a due sense of responsibility and check all legislation which, upon its face, clearly violates constitutional provisions, the courts would be relieved from cases, the constant determination of which brings the legislature into public contempt.

But the function of the legislature in giving effect to the Constitution is not limited to refraining from legislation which the courts will nullify.

As has been already pointed out, the power of the State Legislature in the field of legislation is without qualification, except in so far as expressly restricted by constitutional prohibition. Within the delegated field their discretion is untrammelled, and not subject to review; upon the members of the legislative body rests the ultimate responsibility, for a faithful adherence to the principles of free government. The possibilities of legislative power are sufficiently great to permit wide departure from the traditions of the men who founded our states, without stepping beyond constitutional lines. The genius of free institutions may be destroyed without impairing the guarantees of the written Constitution. We have inherited traditions for whose preservation we must rely upon the legislature. In an age of great intellectual activity, when speculative thought has become deeply interested in governmental and economic problems, it is easy



for the legislature, while still within the terms of our written Constitution, to be regardless of principles which have heretofore controlled. A new generation has come to think that a nation can be reformed by the machinery of new laws; and each session of the legislature is flooded with bills, some of which become laws, whose purpose is to establish rules of conduct, which do not conform to the habits of thought or action of the great body of the community. Such laws are a nullity—not by judicial judgment, but by the common consent of the people. They stand on the statute book a dead letter, and by their existence tend to destroy public respect for law. If any lesson can be learned from the history of democracy, it is—that statutes must substantially express the common conscience of the community; it is possible that in governments where there is a sovereign power other than the people, statutes may be enacted to educate the community to higher standards—such is not the history of true growth in a democracy—the reform must first come into the life of the people, then it may find expression in statutes.

The functions of government in a democracy should be few.

The government is best which allows the largest amount of individual liberty compatible with good order and tranquillity . . . and improvement in political science will be found to consist in throwing off many of the restraints enforced by law and once deemed necessary to an organized society.

In the Bill of Rights is this clause :

No man can of right be compelled to attend, erect or support any place of religious worship, or to maintain any ministry against his consent.

All recognize that by freedom from enforced support—the revenues of religious societies have been largely augmented.

In this there is a lesson which can be properly applied. Legislative appropriations to charities have been greatly increased during the last decade. While there are certain dependent classes for whose support the state may properly appropriate public funds or provide institutions for their care, the legislature will best conserve the spirit of free insti-

tutions by leaving charities generally to the individual care of its citizens. While worthy institutions might feel the sudden withdrawal of state aid—the history of charities which have never received any aid from the public treasury shows that to them flows the stream of private beneficence which immediately turns in large measure from those having the support of the state.

Under guise of the exercise of the police power bills are introduced at each session of the legislature which while they may not violate the letter of the Constitution tend to make the body of the people impotent, without manhood, self-reliance or any of the attributes of freemen. We all recognize that as communities become dense, the legislature is properly called upon to adopt new regulations to protect the lives, health and property of citizens living in thickly populated communities. Subjection to such rules and regulations is the only condition upon which life can be comfortably and safely maintained, and every man who locates himself in such community surrenders some part of his individual liberty in consideration of the restraint which law places upon his neighbors for his protection—but the exercise of the police power is one which always calls for the highest political discretion upon the part of law-makers. Laws must not exceed the reasonable standard which the common sentiments of the community demand, else the government assumes to the people the attitude of an external sovereign and the sentiment of freedom and independence dies. The law should never undertake to supply a community with anything better than they can win for themselves, else the recipients of the law's good things, become accustomed to look to it rather than to themselves for the comforts of living. In all this class of legislation, the legislature has full scope for the exercise of a wise discretion.

This category could be enlarged, but further discussion of detail is unnecessary, the principles have been illustrated. Every effort which tends to elevate the standard of our political and social life should receive the support of all right-thinking citizens, but if we have read history aright we have learned that the only forces which work efficiently towards such elevation are those which reach and renovate

the character of the individual citizen. To promulgate a law prescribing a rule of action not according with the daily life and standards of the body of the people is worse than an idle form. That statute becomes merely a dead letter, and the administration of the law is brought into contempt. Our national, state and municipal life has much still to gain. We know it is far from perfect, but the remedy is not in framing statutes based upon ideals which are not those of the people. The advance can only be made when the people have themselves absorbed the idea and seek to realize it. To excite the desire for such higher standard is the true work of reformers, but the work will never be effectually done until there is a recognition that the agencies of government have none of the attributes of sovereign power. That the source of all governmental power is in the "governed," and that laws are effectually enforced only when they express the will of the freemen who live under them.

Every reflecting man will admit that a legislator who knows the clauses of the written Constitution, and who is imbued with the spirit of those unwritten constitutions which are synonymous with free institutions, has full field for the exercise of an intelligent discretion in the performance of his duty not as a member of a "sovereign body," but as a "trustee and servant" of the people, remembering that to him and his fellow-servants has been delegated the duty not of government but of law-making, subject to the restrictions expressed in the Constitution.

If legislators would perform their duties in remembrance of these principles there would be little to be done by the judiciary in enforcing constitutional limitations. So long as so-called legislation is enacted in forgetfulness of the Constitution, the judiciary must remain as a bulwark for the protection of the rights of the individual freeman.

I would sum up the results of this paper in these propositions:

*First*—The judiciary should have the support of the bar in the performance of its highest function, the declaring of statutes to be of no force when in derogation of rights secured by the Constitution or Bill of Rights. The exercise of this power is necessary to maintain the integrity of our

system of government. The other alternatives are passive submission to the unrestrained power of a legislative assembly, the most arbitrary of all tyrannies, or the anarchy which would follow if each citizen should undertake to be the judge of the constitutionality of legislation whenever it seriously ran counter to his interests. The present and coming generation can safely follow Chief Justice Gibson and conclude that the exercise of this power by the judiciary exists, because it is necessary.

*Second*—It is the duty of the legislature not only to regard the letter of the Constitution and thus relieve the courts of the embarrassing duty of declaring the statute of no force as in violation of constitutional limitations, but every member of the assembly should feel himself charged as the “agent and trustee” of his constituents with the duty of scanning every bill in the spirit of the Bill of Rights, and while recognizing that there is a wide field for legislative activity in the framing of laws which will secure the property, lives, health and general safety of the people; which will enable them to enjoy those blessings for the better securing of which governments exist, he must always remember that we are a nation of freemen, and no law should be inscribed on our statute book which is not in harmony with the principles of liberty and the traditions, customs and daily life of a free people.

*Richard C. Dale.*